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Attorneys for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),
Petitioner,

vs.

JOSEPHINE BOBO, as administratrix of the estate of Perry E. Bobo, deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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JOSEPHINE BOBO, as administratrix of the estate of Perry E. Bobo, deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This was an action for damages for the death of Perry E. Bobo, brought by respondent as adminstratrix of the estate of Perry E. Bobo, deceased, under the Federal Employers' Liability Act, Title 45, U. S. Code, in the Superior Court of the State of California. By her complaint respondent charged petitioner with negligence. (R. 1, 2 and 3.) To this

complaint the petitioner filed an answer (R. 4, 5 and 6), in which it denied the allegations of negligence, dependency of respondent and of the minor children of said deceased and also that the respondent and minor children had been damaged by the death of said deceased. The petitioner in its answer did not set up the defense of assumption of risk. The matter was regularly set down for trial before a jury. At the close of the testimony in chief of respondent, the respondent made a motion for a nonsuit (R. 87), which after argument was denied by the trial Court. Petitioner after having made the motion for a nonsuit introduced testimony in its defense (R. 89 to 101) and submitted instructions touching the two points on which it relies now. (R. 105, 106 and 107.)

QUESTIONS INVOLVED.

General questions arising out of the issues here presented are:

(1) Does not the petitioner ask this Court to determine the weight of the proof since these matters turn upon no interpretation of the Act of Congress but involves simply an appreciation of the testimony and admissible inferences therefrom?

(2) Are these proper Federal questions?

(3) Did not the petitioner by introducing testimony in its own behalf, after the denial of its motion for a nonsuit thereby waive any exception it may have taken to the refusal of the Court below to grant a nonsuit?

(4) Did not petitioner by submitting instructions touching the several points on which it relied consent that the issues of fact be submitted to the jury?

(5) When an action at law is tried before a jury is their verdict subject to review on the question of insufficiency of the evidence to sustain it in the absence of a request for a peremptory instruction?

(6) Is not the question whether the deceased assumed the risk a question of fact, without exceptional features?

(7) Is not the burden upon petitioner to prove that the deceased assumed the risk?

(8) Is not the question of the establishment of negligence and causal connection between this and the injury complained of one of fact without exceptional features?

PETITIONER'S QUESTIONS.

Two questions are raised by the petitioner.

(1) Is it not incumbent upon one claiming damages under the Federal Employers' Liability Act to establish negligence and causal connections between this and the injury?

(2) Does not an employee engaged in interstate commerce assume the risk of the use of appliances, even though the same are defective, if such defective condition and the risk incident to their use are so obvious that an ordinarily prudent person under the circumstances must have observed and appreciated them?

It will appear from an examination of the record that all of the assignments of error are based upon exceptions which relate to the refusal of the Court below to grant the motion for a nonsuit made by petitioner at the close of the testimony in chief of respondent. (R. 112, fol. 145.)

Both of these questions were passed on by the Courts below. The trial Court acting on the motion for a nonsuit and upon the motion for a new trial. The District Court of Appeal also passed upon this question twice. Once on the main case and then upon a petition for a rehearing, and the Supreme Court of California, which is the highest Court of the State, passed upon these matters and denied petitioner's petition for a hearing. These matters were extensively argued and petitioner filed five briefs in the three lower Courts.

The opinion of the District Court of Appeal of the State of California (R. 111) does not show that the questions here presented were answered in the negative. The Court considered and passed upon these questions and held that they were questions of fact and that the facts reasonably presented a case for the jury and that the jury's conclusions were fairly supported by the evidence.

In the case of *So. R. Co. v. Puckett*, 244 U. S. 571, this Court said:

> "The Federal Supreme Court will not disturb the concurrent conclusions of the two State Courts in an action brought under the Federal Employers' Liability Act; that there was sufficient ground for attributing negligence to the

railway carrier because of the presence of large clinkers in the path along which an employee was called to pass in the course of his duty and over which he stumbled."

A verdict approved by the three lower Courts should be accepted as a conclusive finding upon the questions of fact involved:

Southern Pacific Co. v. Bogert, 250 U. S. 483;
Chicago and E. I. R. Ry. Co. v. Collins Produce Co., 249 U. S. 186;
El Paso and S. W. R. Co. v. Vizard, 214 U. S. 608.

RESPONDENT'S QUESTIONS.

(1) The petitioner here asks this Court to determine the weight of the proof since this matter turns upon no interpretation of the Act of Congress but involves simply an appreciation of the testimony and the admissible inferences therefrom.

Section 344, Title 28, U. S. C. A., which is Section 237 of the Judicial Code, confers appellate jurisdiction on this Court over final judgments and decrees in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of . . . a statute of the United States, and the decision is against its validity.

Questions of general law, raised in an action under the Federal Employers' Liability Act, which involve no construction of the Federal Statute, and neither directly nor indirectly affect any Federal right, will

not be reviewed on a writ of error from the Federal Supreme Court to a State Court.

Central Vermont R. Co. v. White, 238 U. S. 507.

(2) The decision in the case at bar does not deprive the petitioner of any Federal right under the Statute and therefore these are not proper Federal questions.

Seaboard Airline Ry. v. Padgett, 236 U. S. 668; *Minneapolis, St. P. & St. Ste., M. R. Co. v. Poplar,* 237 U. S. 371.

(3) The record shows that petitioner, after having made the motion for a nonsuit introduced testimony in its defense. Petitioner's assignment of error that the Court denied its motion for a judgment of nonsuit, made at the conclusion of respondent's evidence, is of no avail to the petitioner, for the reason that, after denial of its motion it proceeded to introduce testimony in its own behalf.

Hartford Life Ins. Co. v. Unsell, 144 U. S. 149.

In the case of *McCabe and Steen Const. Co. v. Wilson,* 209 U. S. 275, the Court says:

> "When the plaintiff rested the Court overruled a demurrer to the evidence * * * this ruling, however, cannot avail the defendant, whatever the defects then in the case for thereafter it proceeded to introduce testimony in its own behalf, and this waived any supposed error."

See also:

Sigafus v. Porter, 179 U. S. 116.

(4) The defendant assumed that the questions upon which it now predicates error would be submitted to

the jury and submitted instructions touching the several points on which it relies. (R. 105, 106 and 107.) Petitioner cannot therefore, now claim that the submission of these issues of fact to the jury was erroneous.

(5) The right to attack a judgment on the grounds that the evidence is insufficient to support the judgment is lost by failure of the petitioner to request a peremptory instruction. It must be assumed that there was sufficient evidence to warrant the Court below in permitting the jury to decide upon the evidence where there was no motion to direct a verdict.

Hansen v. Boyd, 161 U. S. 397.

The record shows that the petitioner upon the close of the evidence did not make a motion to direct a verdict in its behalf. Section 629 of the Code of Civil Procedure of the State of California reads as follows:

> "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.
>
> A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on motion for new trial or the appellate court on appeal from the judgment may order judgment

to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial; and when the motion is made in the alternative form, the court may also so order on appeal from the [*other*] denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied."

The Courts of California have held that the section requires that a motion for judgment, notwithstanding the verdict, be made before the entry of the judgment thereon, and that as a condition to such motion, a motion for a directed verdict be made at the trial.

Cushman v. The Cliff House, 250 Pac. 575.

In the absence of a motion for a directed verdict, insufficiency of evidence to support the verdict is not presented on appeal.

In the case of *Steil v. Holland,* 3 Fed. (2nd) at page 777, the Circuit Court of Appeals of the Ninth Circuit say:

"When an action at law is tried before a jury, their verdict is not subject to review, unless there is absence of substantial evidence to sustain it, and even then it is not reviewable, unless a request has been made for a peremptory instruction and an exception taken to the ruling of the Court."

In the case of *Hansen v. Boyd,* 161 U. S. 397, the Court, speaking through Mr. Justice White says:

"Petitioner here asks this Court to determine the weight of the proof, and thus usurp the province of the jury. There was no motion made at the close of the evidence to direct a verdict,

and both parties therefore agreed to the submission of the issues to the consideration of the jury. In the absence of such a request, we must assume that there was sufficient evidence to warrant the Court in permitting the jury to draw the inferences proper to be deducted from the evidence in the case."

General verdict settles all disputed questions of fact, and unless tested by motion for peremptory instruction at close of evidence it also settles all undisputed questions of fact:

Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, 299 Fed. 478—Cert. Denied, 266 U. S. 618.

(6) The question whether the deceased assumed the risk is a question of fact. This Court cannot as a matter of law declare that an employee assumed a risk where there is any substantial evidence that he did not.

Petitioner recites at length the evidence in the case upon which it relies in support of its said contention that the deceased assumed the risk, but what the deceased actually knew as to these defects cannot be known. In determining the question of assumption of risk, the injured employee will not be presumed to be negligent or to knowingly incur risk or danger of injury.

It is presumed that deceased proceeded with diligence and due care.

Looney v. Metropolitan R. R. Co., 200 U. S. 480;

Erie R. Co. v. Lindquist, 27 Fed. (2d) 98.

The presumption is a species of evidence and uniformly it has been held that unless the presumption is controverted by direct evidence the jury must give effect to the presumption and reach a result consistent with the view that the deceased proceeded with diligence and due care and did not knowingly incur risk or danger of injury. Where the state of the evidence is such that it is plausible to conclude either that there was or was not an assumed risk, the presumption comes into operation and determines the question in the negative unless there is additional evidence which is totally incompatible with the presumption.

The evidence introduced by the petitioner (R. 93) shows that in sixteen years there has never been an accident on the bridge and (R. 95) that there never was an accident taking place on the steps by anybody falling on the steps.

Two things are essential to make out the defense, to-wit:

1. Knowledge of the defective condition out of which the risk arose.

2. Appreciation of the risk arising therefrom.

The knowledge of conditions from which a risk arises which the doctrine calls for is immediate knowledge obtained from pure observation. It does not cover inferences or conclusions therefrom as to possible, or probable, or likely conditions.

Here there was no evidence to show that the deceased who worked on the bridge during the night time, knew that the knobs in line with the position

of his feet as he descended the steps, were worn smooth and that water would collect in the depressions in the steps and platform and that if he should slip thereon he would be precipitated into the water and come to his death by drowning. The deceased might be charged with contributory negligence in not having discovered the existence of the risk but could not be held to have assumed a risk which the evidence of the petitioner shows was not present.

When the deceased was confronted with the increased risk he had no such freedom of choice as to whether he would continue in or leave petitioner's service which is essential to call for the application of the doctrine of assumption of risk.

(7) The burden of proving employee assumed risk is upon the petitioner. The assumption of risk was a matter of defense to be invoked by the petitioner.

Mappin v. Atchison, Topeka, etc., R. Co., 198 Cal. 733—Cert. Denied 273 U. S. 729;

Thomas v. Southern Pacific Co., 116 Cal. App. 126—Cert. Denied 284 U. S. 689;

Great Northern R. Co. v. Knapp, 240 U. S. 466.

When Congress by this statute greatly broadened plaintiff's right to recover, preserving only one bar, i. e. (Assumption of Risk), the defendant must bring its case clearly within the bar so preserved; and that deceased's conduct should not be treated as assumption of risk, and so be allowed to defeat the rights of those dependent upon him, unless it can be clearly and distinctly so classified.

(8) The question of the establishment of negligence and causal connection between this and the

injury was one of fact. Direct or positive proof is not required to show that a negligent act or defect was the cause of an injury to or death of an employee engaged in interstate commerce. The manner and circumstances of the occurrence and all the accompanying surroundings, as proven may be examined in order to ascertain and determine whether or not an inference that negligent defect caused the death was a reasonable one, and if the plaintiff shows facts and circumstances from which negligence of the defendant and the causation of the accident by negligence may be reasonably and legitimately inferred, the cause should be submitted to the jury.

St. Louis & San Franci o Ry. Co. v. Bishop, 33 S. W. (2d) 383, cert. denied 283 U. S. 854.
Caroline C. & O. R. Co. v. Stroup, 239 Fed. 75.

This Court in *New York C. R. Co. v. Marcone,* 281 U. S. 347, held in a case where the deceased was killed by an engine which was being removed from a roundhouse by an hostler, there being no eye witness to the accident, that it was for the *jury* to say whether defendant exercised due care in moving the engine without a more specific and effective warning than that given by the hostler and whether failure to give such warning was the proximate cause of the death.

Petitioner argues in its petition that the deceased may have jumped off the bridge. There is a presumption, which is in the nature of evidence that a person is innocent of crime or wrong.

Where the deceased is found dead under circumstances that the death may have been due to suicide or to accident, the presumption is against suicide and

in favor of accident, following logically from the statutory presumption that a person is innocent of crime or wrong.

Wilkinson v. Standard Accident Ins. Co., 180 Cal. 256.

ARGUMENT.

Assuming the questions to be before the Court, without waiving the contention that they are not proper Federal questions, the following argument is submitted:

The record before this Court is incomplete in that the exhibit (R. 118B) was marked by a witness (R. 29) and the mark showing the place where he found the blood spot and the wool is not shown on this exhibit. Other witnesses testified from other exhibits and they too are not marked. The only exhibit attached to this record which shows the marks is plaintiff's exhibit No. 1C. (R. 118J.)

A presumption is a species of evidence and in California inferences in themselves constitute a recognized class of indirect evidence which a court or jury may not disregard. Unless a presumption is controverted by other evidence, the jury is bound to find in accordance with the presumption.

Smellie v. Southern Pacific Co., 212 Cal. at page 561.

Petitioner says:

"Under the decision of the District Court of Appeal of the State of California, respondent is permitted to recover damages under the Federal

Employers' Liability Act, without establishing negligence and causal connection between the negligence and the death of the decedent."

This statement is too broad. By referring to the facts and the holding in this case it will be found that the District Court of Appeal upheld respondent's contention that the decedent slipped from the platform and was drowned, the defects specifically alleged in respondent's complaint being the cause of his falling and ends its opinion with the following:

> "*We are satisfied that the facts reasonably presented a case for the jury and that its conclusions are fairly supported by the evidence.*"

The Court does not restrict the rule of law relied upon by petitioner. It cites in its decision, *A. T. & S. Fe Ry. Co. v. Toop*, 281 U. S. 351, and *Chicago, Milwaukee and St. Paul Ry. Co. v. Coogan*, 271 U. S. 472, both cases upon which petitioner relies and cites in its brief accompanying its petition for a writ of certiorari.

The Court further says:

> "Here the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night and the physical facts fairly support the conclusions that the decedent fell therefrom and that his body passed under the railing into the water."

In the *Saxon* case and in the *Coogan* case, both cited by petitioner as authority, the defendants presented a motion for a directed verdict. In the case at

bar no motion for a directed verdict in its behalf was made by the petitioner.

By consent of the parties, the jury was taken to the bridge and had an ocular view of the place of the accident. They had a right to draw their own inferences and conclusions from the facts thus presented to them. What that inspection conveyed to the minds of the jury cannot be known from this record, therefore, this Court cannot and does not have the entire record before it. Evidence was offered in support of the contention of respondent and the weight of it under the law was for the jury to determine.

The Court should not reverse a judgment because of insufficient evidence to support a finding of fact by the jury based on the evidence and an ocular inspection of the place of accident, where the question of negligent construction and maintenance thereof was an issue in the case.

Chaetaye O. & G. R. Co. v. Holloway, 191 U. S. 334.

Where, in any case, it is a matter of judgment and discretion of sound inference, what is the deduction to be drawn from even undisputed facts, where different men, equally sensible and equally impartial, would make different inferences, the law commits such a case to the decision of the jury under instructions from the Court.

In the case of *Railroad Co. v. Powers*, 149 U. S. 43, Mr. Justice Brewer, in delivering the opinion of this Court, said:

> "It is well settled that, where there is uncertainty as to the existence of either negligence or

contributory negligence, the question is not one of law, but of fact, and to be settled by the jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

See also:

Gardner v. Railroad Co., 150 U. S. 349.

Whether the act of deceased be assumption of risk or contributory negligence, it was for the jury to determine whether it would bar a recovery, and not for the Court. In the present case, there is nothing which appears that can be properly chargeable to the deceased as an assumed risk, and it is undoubtedly a question of fact whether the deceased assumed the risk even though the evidence is undisputed. It was for the jury to make a proper deduction from the evidence.

Sioux City and P. R. Co. v. Stout, 17 Wall. 657;
Davidson S. S. Co. v. U. S., 205 U. S. 187.

The burden is upon the petitioner to show that the deceased was chargeable with knowledge of the material conditions which were the immediate cause of his injury and must establish his appreciation of the dangers produced by the abnormal conditions and that he knew these conditions endangered his safety. It was for the jury to determine whether deceased's conduct showed assumption of risk or contributory negligence.

Great Northern R. Co. v. Knapp, 240 U. S. 466.

The Supreme Court is not called upon to scrutinize the entire record for the purpose of discovering

whether it may not be possible, by a minute analysis of the evidence to draw therefrom inferences which may possibly conflict with the conclusions of the Courts below as to the tendencies of the proof.

Chicago Junction R. Co. v. King, 222 U. S. 222.

The assignment of errors by petitioner do not show any repugnancy between the decision of the Court in this case and the applicable decisions of the United States Courts.

There was no denial to the petitioner of any right under the Federal Statute.

Here the trial Court gave every instruction requested by the petitioner and no complaint is made by petitioner as to the incorrectness of any instruction given by the trial Court.

The questions raised by the petitioner do not require any interpretation of the Act of Congress by this Court, but are questions of fact, which were properly submitted to the jury.

The question of whether there was sufficient evidence to allow the case to be submitted to the jury, rests with the trial Court. Here the trial Court upheld the verdict of the jury and the District Court of Appeal unanimously affirmed the trial Court and the Supreme Court of the State of California, denied a hearing. Therefore this Court should not disturb the concurrent conclusions of the State Courts upon the questions of fact involved herein.

Texas & P. R. Co. v. Swearingen, 196 U. S. 51.

Therefore it is respectfully submitted that the petition for a writ of certiorari should be denied and that respondent recover her costs.

Dated, San Francisco, California,
July 7, 1933.

ROBERT D. DUKE,
Attorney for Respondent.

LAWRENCE A. COWEN,
Of Counsel.